Oh Kuang Liang v Associated Wood Ind Sdn Bhd

HIGH COURT (JOHOR BAHRU) — ORIGINATING MOTION NO 25-40-94
ABDUL MALIK ISHAK J
8 JUNE 1995

Civil Procedure *— Affidavit — Striking out prejudicial material — Affidavit may be struck out if scandalous and irrelevant — Sufficient to strike out parts of affidavit — Rules of the High Court 1980 O 41 r 6*

The respondent swore an affidavit, of which one of the paragraphs referred to certain 'without prejudice' letters between the parties' solicitors. The applicant applied to the court to strike out the affidavit pursuant to O 41 r 6 of the Rules of the High Court 1980 on the ground that the 'without prejudice' letters were inadmissible.

Held, allowing the application:

(1) An affidavit must be pertinent and material and may be ordered to be taken off the court file if scandalous and irrelevant matter was inserted. However, it was not necessary for the court to strike out the whole affidavit; it was sufficient for the court to strike out only those parts of the affidavit which were scandalous, irrelevant or otherwise oppressive.

(2) The 'without prejudice' rule applied generally to exclude all negotiations genuinely aimed at settlements whether oral or in writing from being given in evidence. The various exceptions which previous cases had laid down to the above rule should not be allowed to whittle down the protection given to all parties to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts. If the compromise failed, the maker should not be held accountable and the admission of the facts made for the purpose of the compromise should not be received in evidence.

[Bahasa Malaysia summary

Penentang telah mengikrarkan satu afidavit, yang mana satu daripada perenggannya merujuk kepada beberapa surat 'without prejudis' tertentu di antara peguamcara pihak-pihak itu. Pemohon memohon kepada mahkamah untuk membatalkan afidavit itu mengikut A 41 k 6 Kaedah-Kaedah Mahkamah Tinggi 1980 atas alasan bahawa surat-surat 'tanpa prejudis' itu tidak boleh diterima.

Diputuskan, membenarkan permohonan itu:

(1) Satu afidavit mestilah relevan dan penting dan boleh diperintahkan supaya dikeluarkan dari fail mahkamah jika

bahan yang menimbulkan skandal dan tidak relevan dimasukkan. Namun demikian, tidaklah perlu bagi mahkamah membatalkan keseluruhan afidavit itu; memadailah untuk mahkamah membatalkan hanya bahagian afidavit itu yang menimbulkan skandal, tidak relevan atau menindas.

(2) Kaedah 'tanpa prejudis' terpakai secara am untuk mengetepikan semua rundingan yang sebenarnya ditujukan ke arah penyelesaian sama ada secara lisan atau secara bertulis daripada diberikan dalam keterangan. Berbagai kecualian kepada kaedah itu yang telah ditetapkan oleh kes-kes lalu tidak patut dibenarkan mengurangkan perlindungan yang diberikan kepada semua pihak untuk bercakap secara bebas tentang semua isu-isu di dalam litigasi, kedua-dua fakta dan undang-undang, apabila mencari kompromi dan, bagi tujuan mendirikan asas satu kmpromi, mengakui fakta-fakta tertentu. Jika kompromi itu gagal, orang yang membuatnya tidak patut bertanggungan dan pengakuan fakta-fakta yang dibuat untuk tujuan satu kompromi tidak patut diterima dalam keterangan.]

Notes

For cases on striking out of affidavits, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 204.

Cases referred to

Aluminium Industries Sdn Bhd v Cookermate (M) Sdn Bhd [1990] 2 CLJ 777 (refd)
Cutts v Head [1984] 1 All ER 597; [1984] Ch 290 (refd)
Kitcat v Sharp (1882) 48 LT 64 (refd)
Malayan Banking Bhd v Foo See Moi [1981] 2 MLJ 17 (refd)
Osmaston v Association of Land Financiers (1878) WN 101 (folld)
Daintrey, ex p Holt, Re [1893] 2 QB 116; [1891–4] All ER Rep 209
Rossage v Rossage [1960] 1 WLR 249; [1960] 1 All ER 600 (refd)
Tomlin v Standard Telephones and Cables [1969] 1 WLR 1378; [1969] 3 All ER 201; [1969] 1 Lloyd's Rep 309 (refd)
Walker v Wilsher (1889) 23 QBD 335
Warner v Mosses (1881) WN 69

Legislation referred to

Rules of the High Court 1980 O 41 r 6

Tan Hing Kuang (*Tam Cheng Yau, Tan & Co*) for the applicant.
Gan Techiong (*Gan & Lim*) for the respondent.

Abdul Malik Ishak J: This is an application by the respondent (encl 8) to strike out the affidavit of Oh Kuang Liang ('Oh'), the applicant in this originating motion, that was affirmed on 17 May 1995 (encl 6). The application of the respondent is supported by the affidavit of Tan Tu Kiah ('Tan'), the director of the respondent's company, affirmed

on 25 May 1995 (encl 7). Tan deposed in his affidavit that the 'without prejudice' letters between solicitors are inadmissible as they were said to be privileged. Tan took particular objections to two letters (dated 28 January 1994 and 6 April 1994) which he singled out and which clearly bore the 'without prejudice' labels on them; he too took exceptions to the other three letters which equally bore the 'without prejudice' tags on them. There was only one letter dated 26February 1994 which did not carry the 'without prejudice' label.

17 *Halsbury's Laws of England* (4th Ed) at para 212, contains a brief summary of the law on communications 'without prejudice'. There, it is stated that:

> Letters written and oral communications made during a dispute between the parties, which are written or made for the purpose of settling the dispute, and which are expressed or otherwise proved to have been made 'without prejudice', cannot generally be admitted in evidence. The rule does not apply to communications which have a purpose other than settlement of the dispute; thus, it does not apply in respect of a document which, from its character, may prejudice the person to whom it is addressed.
>
> The privilege, where it exists, cover not only the particular letter itself but also all subsequent parts of the same correspondence on both sides, even if they are not expressed to be 'without prejudice', unless there is a clear break in the chain of correspondence to show that the ensuing letters are open. Moreover, it has been held to cover an open letter, followed by another from the same party to the effect that their communications were intended to be 'without prejudice'.

Again, at para 213 of the same book under caption 'Limits of the rule', it is stated that:

> The contents of a communication made 'without prejudice' are admissible when there has been a binding agreement between the parties arising out of it, or for the purpose of deciding whether such an agreement has been reached, and the fact that such communications have been made (though not their contents) is admissible to show that negotiations have taken place, but they are not otherwise admissible. Thus they cannot be used as admissions, or as acknowledgments to prevent a debt from becoming statute-barred, or, normally, for purpose of deciding the question of costs, or to show malice, although it has been held that they may be admitted to prove matters not connected with the merits of the dispute.
>
> The consent of both parties to the dispute is required for the privilege to be waived, even if there has been only one communication.

Order 41 r 6 of the Rules of the High Court 1980 ('RHC') reads as follows:

> The Court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive.

Osmaston v Association of Land Financiers (1878) WN 101 and *Rossage v Rossage* [1960] 1 WLR 249; [1960] 1 All ER 600, lay down an inflexible rule an affidavit must be pertinent and material and may be

ordered to be taken off the file if scandalous and irrelevant matter is inserted. Even, at times, scandalous matter may be expunged (*Warner v Mosses* (1881) WN 69). But it is not necessary for the court to strike out the whole affidavit; sufficient if the court strikes out only those parts which are scandalous, irrelevant or otherwise oppressive.

From a perusal of Oh's affidavit in encl 6, only para 7 is said to be objectionable — and that paragraph is worded thus:

> Malahan sehingga affidavit responden diserahkan kepada peguam saya pada 5 April 1995 saya langsung tidak tahu akan tarikh perjanjian jual beli di antara responden dan pemaju dan walaupun saya telah beberapa kali melalui peguam saya menulis kepada peguam Responden untuk meminta sesalinan perjanjian tersebut mereka telah enggan membuat demikian. Saya lampirkan bersama ini salinan-salinan surat-surat peguam saya serta jawapan-jawapan dari Tetuan Gan & Lim di tanda sebagai exhibit 'C'.

Exhibit 'C' refers to the letters between the solicitors adverted to in the early part of this judgment.

Abu Mansor J (as he then was, now FCJ) in *Aluminium Industries Sdn Bhd v Cookermate (M) Sdn Bhd* [1990] 2 CLJ 777 at p 779 applied *Tomlin v Standard Telephones and Cables Ltd* [1969] 1 WLR 1378; [1969] 3 All ER 201; [1969] 1 Lloyd's Rep 309, and ruled that the 'without prejudice' letters between counsels were admissible because it was not possible to determine the issue without looking at the correspondence to see whether there was a binding agreement. His Lordship then proceeded to examine the affidavits of the parties together with the 'without prejudice' letters.

Tomlin was a decision of the English Court of Appeal. There, the three judges wrote separate judgments. Sir Gordon Willmer agreed with the decision of Danckwerts LJ, while Ormrod J, wrote a dissenting judgment.

In strong words Danckwerts LJ, in *Tomlin* said:

> A point that arises is that all the letters written by the agent of the insurance company bore the words 'without prejudice'. The point is taken that, by reason of those words, there could not be any binding agreement between the parties and it was said, indeed, on behalf of the defendants that the letters were not admissible. I feel no doubt, as the learned judge felt no doubt, that the letters were admissible, because the point was whether there had been a concluded agreement of any kind between the parties in accordance with that correspondence, and it would be impossible to decide whether there was a concluded agreement or not unless one looked at the correspondence.

In his dissenting judgment, Ormrod J, in *Tomlin* said at p 203:

> From these cases it seems to me that the principle which emerges is that the court will protect, and ought to protect so far as it can, in the public interest, 'without prejudice' negotiations because they are very helpful to the disposal of claims without the necessity for litigating in court and, therefore, nothing should be done to make more difficult or more

> hazardous negotiations under the umbrella of 'without prejudice'. I am well aware, coming from the Division which I do, that letters get headed 'without prejudice' in the most absurd circumstances, but these letters, in my judgment, are not letters headed 'without prejudice' unnecessarily or meaninglessly. They are plainly 'without prejudice' letters and, therefore, the court, in my judgment, should be very slow to lift the umbrella of 'without prejudice' unless the case is absolutely plain.

There is one distinguishing feature in *Aluminium Industries Sdn Bhd v Cookermate (M) Sdn Bhd* which is also apparent in *Tomlin* (supra). It is this. The question of privilege was not raised in these cases. The question of privilege is raised before me in bringing home the point that the letters with the 'without prejudice' labels were inadmissible.

Cutts v Head [1984] 1 All ER 597 at pp 605–606; [1984] Ch 290 at p 306, lays down a sound principle of law which merits reproduction. It is as follows:

> That the rule rests, at least in part, on public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J, in *Scott Paper Co v Drayton Paper Works Ltd* (1927) 44 RPC 151 at 157, be encouraged freely and frankly to put their cards on the table ... . The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.

It appears therefore that the 'without prejudice rule' is a rule governing the conduct of the trial in particular controlling the admissibility of evidence and is founded on the time honoured public policy of encouraging litigants to settle their differences rather than litigate them in a court of law. Court battles are to be avoided if the parties could settle their differences amicably.

I am of the considered view that the 'without prejudice rule' applies generally to exclude all negotiations genuinely aimed at settlements whether oral or in writing from being given in evidence. A prudent and competent solicitor will always be on guard and will always label any negotiating correspondence with the words 'without prejudice' — to make known and to make clear beyond doubt that in the event the negotiations fell through, they are not to be referred to at the subsequent trial. I think the correct approach to resolve the 'without prejudice rule' would be by balancing two different public interests, namely, the public interest in promoting settlements, on the one hand, and the public interest in full discovery between parties to litigation, on the other.

I have done some research and I have discovered that nearly all the cases where the scope of the 'without prejudice rule' has been

considered concern the admissibility of evidence at trial after negotiations have failed. It is quite obvious that in these situations no question of discovery arises because the parties are well aware of what had transpired between them in the negotiations. It is not incorrect to say that the underlying purpose of the 'without prejudice rule' is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement. Lindley LJ held in *Walker v Wilsher* (1889) 23 QBD 335 at p 337, that the without prejudice material will be admissible if the issue is whether or not the negotiations resulted in an agreed settlement and this point seems to have been applied in *Tomlin*. I must at once sound a warning that *Walker v Wilsher* is not an authority for the proposition that if the negotiations succeed and a settlement is concluded the privilege is thrown to the wind, having served its purpose. On a proper reading of *Walker v Wilsher*, I would have thought that there it was held that it was not permissible to receive the contents of a without prejudice offer on the question of costs and no question arose as to the admissibility of admissions made in the negotiations in any possible subsequent proceedings. *Cutts v Head* propounds the principle that in certain circumstances the without prejudice correspondence may be looked at to determine a question of costs after judgment has been given. In *Re Daintrey, ex p Holt* [1893] 2 QB 116; [1891–4] All ER Rep 209, the court refused to allow the 'without prejudice rule' to exclude an act of bankruptcy and in *Kitcat v Sharp* (1882) 48 LT 64, the court too refused to be bound by the 'without prejudice rule' when its purpose was to suppress a threat if an offer is not accepted. I am of the view that the exceptions referred to in these cases should not and must not be allowed to whittle down the protection given to all parties to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts. If the compromise fails, the maker should not be held accountable and the admission of the facts made for the purpose of the compromise should not be received in evidence. I am not prepared, to borrow the words of Ormrod J in *Tomlin*, to lift the umbrella of 'without prejudice' for the applicant. Rain or shine, that umbrella should remain. I am fortified in my view by the passages appearing in the judgment of Chang Min Tat FJ, in *Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ 17 (FC), to the effect that:

> It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted. This is in order not to fetter but to enlarge the scope of the negotiations, so that a solution acceptable to both sides can be more easily reached. But it is also settled law that where the negotiations conducted without prejudice lead to a settlement, then the letters become admissible in evidence of the terms of the agreement, unless of course the agreement has become incorporated in another document which would then be the evidence of the agreement.

With respect, had *Malayan Banking Bhd v Foo See Moi* been brought to the attention of the learned judge in *Aluminium Industries Sdn Bhd v Cookermate (M) Sdn Bhd*, the decision arrived at might be different.

For the foregoing reasons, in my discretion, I strike out the whole of para 7 together with exh 'C' of encl 6, with an agreed costs of RM200 to the respondent payable by the applicant.

Order accordingly.

Reported by Edmund Cham